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THE BASIC DOCTRINE OF AMERICAN CONSTITUTIONAL LAW.

THE two leading doctrines of American Constitutional Law before the Civil War, affecting state legislative power, were the Doctrine of Vested Rights and the Doctrine of the Police Power. The two doctrines are in a way complementary concepts, inasmuch as they represent the reaction upon each other of the earlier conflicting theories of natural rights and legislative sovereignty. But the older doctrine is the doctrine of vested rights, which may be said to have flourished before the rise of the Jacksonian Democracy. Furthermore, if Constitutional Law be regarded from the point of view of its main purpose, namely, that of setting metes and bounds to legislative power, it is the more fundamental doctrine.

Judicial review, we are told repeatedly, rests only upon the written constitution. We shall find ample reason presently to impugn the accuracy of this assertion, particularly for that most important formative period when the tree of Constitutional Law was receiving its initial bent. But letting it for the moment pass unchallenged, the question still remains, what is a constitution for—does it exist to grant power or to organize it? The former of these views is undoubtedly the older one, not only of the national Constitution, but of the state constitutions as well. For the written constitution, wherever found, was at first regarded as a species of social compact, entered into by sovereign individuals in a state of nature. From this point of view, however, governmental authority, wherever centered, is a trust which, save for the grant of it effected by the written constitution, were non-existent, and private rights, since they precede the constitution, gain nothing of authoritativeness from being enumerated in it, though possibly something of security. These rights are not, in other words, fundamental because they find mention in the written instrument; they find mention there because

fundamental. Suppose then the enumeration of such rights to have been but partial and incomplete, does that fact derogate from the rights not so enumerated? Article IX of the Amendments to the United States Constitution answers this question. The written constitution is, in short, but a nucleus or core of a much wider region of private rights, which, though not reduced to black and white, are as fully entitled to the protection of government as if defined in the minutest detail.

And by the other view of the written constitution, whether the so-called "natural rights" were enumerated or not was also a matter of indifference, but for precisely the opposite reason. By this view too the constitution was in a certain sense a grant of power, since government always rests upon the consent of the governed. The power granted, however, was not simply this or that item of specifically designated power but the sum total of that unrestrained sovereignty which in the state of nature was each man's dower. By the very act of calling government into existence, or more accurately, the legislative branch of government, this vast donation of power was conferred upon it, and irretrievably too, save for the right of revolution. Thus, whereas by the first view a constitution is wrapped about, so to say, by an ocean of rights, by this view it is enclosed in an enveloping principle of sovereign power. It thus follows first, that the mere co-existence of three departments within a written constitution leaves the legislature absolute, and secondly, that a mere enumeration of rights in the written constitution leaves them subject to legislative definition. Only by pretty specific provision of the written constitution is the legislative power, by this view, to be held in leash, even with judicial review a recognized institution, and the maxim that all doubts are to be resolved in its favor is to be taken for all that it seems to mean.

But let us consider the effect of these two theories of the nature of the constitution upon the question of the scope of judicial review more directly. The two theories were brought into juxtaposition in the classic case of *Calder* v. *Bull*,[1] which was decided by the Supreme Court in 1798. In that case an act of the Connecticut legislature setting aside a decree of a probate court and granting a new hearing for the benefit of those claiming under a will was denounced by the heirs at law as *ex post facto* and so void under Art. I, § 10 of the United States Constitution. The court rejected this view, holding partly upon the authority of BLACKSTONE, partly upon the *usus loquendi* of the state constitutions, and partly on that of the

[1] 3 Dall. 386 (1798).

United States Constitution, that the prohibition in question did not extend to all "retrospective" legislation, but only to enactments making what were innocent acts when they were done criminal or aggravating the legal character and penalty of past acts. The prohibition was intended, said Justice CHASE, "to secure the *person* of the subject from injury or *punishment,* in consequence of such a *law.*" It was not intended to secure the citizen in his *"personal rights," i. e.,* "his *private rights,* of either *property* or *contracts.*"

Whether this construction of the *ex post facto* clause of Art. I, § 10 met the intentions of the framers of the Constitution is an open question.[2] But it is certain that it did not entirely satisfy the court that made it. Said Justice PATERSON: "I had an ardent desire to have extended the provision in the Constitution to retrospective laws in general. There is neither policy nor safety in such laws." Justice CHASE's condemnation was hardly less sweeping. He admitted that there were "cases in which laws may justly and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement, as statutes of oblivion, or of pardon," but statutes taking away or impairing *"rights vested,* agreeably to existing laws," were also "retrospective," "generally unjust," and "oppressive." Nor was it at all his intention to throw open the doors to such legislation. True the *ex post facto* clause bore a narrow technical meaning, but other clauses of the same section were of broader application: the clause prohibiting states from making laws impairing the obligation of contracts and that prohibiting them from making anything but gold or silver a legal tender. Furthermore there were certain fundamental principles of the social compact and republican government.

"I cannot subscribe," wrote Justice CHASE in a passage which must be regarded as furnishing American Constitutional Law with its leavening principle, "to the *omnipotence* of a *state legislature,* or that it is *absolute* and *without* control, although its authority should not be *expressly* restrained by the *constitution or fundamental law* of the state. The people of the United States erected their constitutions . . . to establish justice, to promote the general welfare, to secure the blessing of liberty, and to protect persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide the proper objects of it. The *nature* and *ends* of *legislative*

[2] See Farrand, Records of the Federal Convention, II, 368, 375, 378, 448, 571, 596, 610, 617, 656; III, 165. See also note by Johnson, J., in 2 Pet. 681 (1829).

power will limit the *exercise* of it. . . . There are acts which the federal or state legislatures cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power. . . . An *Act* of the legislature (for I cannot call it a *law*) contrary to the great principles of the social compact cannot be considered a rightful exercise of legislative authority. . . . A law that punishes an innocent action . . .; a law that destroys, or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes *property* from A and gives it to B: it is against all reason and justice for a people to entrust a legislature with *such* powers; and therefore it cannot be presumed that they have done it. The *genius,* the *nature,* and the *spirit* of our state governments amount to a prohibition of such acts of legislation; and the *general principles of law and reason* forbid them." To hold otherwise were a "political heresy" "altogether inadmissible."

This appeal from the strict letter of the Constitution to general principles CHASE'S associate IREDELL, on the other hand, flatly pronounced invalid. True, "some speculative jurists" had held "that a legislative act against the natural justice must, in itself, be void," but the correct view was that if "a government composed of legislative, executive and judicial departments were established by a constitution which imposed no limits on the legislative power . . . whatever the legislative power chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void. . . . Sir William BLACKSTONE, having put the strong case of an act of Parliament which should explicitly authorize a man to try his own cause, explicitly adds that even in that case 'there is no court that has the power to defeat the intent of the legislature'" when couched in unmistakable terms.[3] Besides, "the ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject; and all that the court could properly say in such an event, would be that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of justice."

Now which of these two views of the range of judicial power under the constitution has finally prevailed? In appearance, IREDELL'S has, but in substance, as I have already hinted, it is CHASE'S theory that has triumphed. The evidence for both these

[3] 1 Comm. 91.

propositions is to be found in COOLEY'S CONSTITUTIONAL LIMITATIONS.[4] Dealing with the subject "of the circumstances under which a legislative enactment may be declared unconstitutional," COOLEY writes: "If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, *unless it shall be found that those principles are placed beyond the legislative encroachment by the Constitution*. . . . Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a *spirit* supposed to pervade the Constitution, *but not expressed in words*." Farther along but still dealing with the same topic, he continues: "It is to be borne in mind . . . that there is a broad difference between the Constitution of the United States and the constitutions of the states as regards the power which may be exercised under them. The government of the United States is one of *enumerated* powers; the governments of the states are possessed of all the general powers of legislation . . . We look in the Constitution of the United States for *grants* of legislative power, but in the constitution of the state to ascertain if any limitations have been imposed upon the complete power with which the legislative department of the state was vested in its creation."

And thus far the victory seems to rest with IREDELL'S view,—but it is in appearance only, as we immediately discover. For whatever terms he may use at times, it is as far as possible from COOLEY'S intention to admit in any real sense the principle of legislative sovereignty. Thus he proceeds: *"It does not follow however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important when they are in the nature of exceptions to a general grant of powers; and if the authority to do an act has not been granted by the sovereign to its representative, it cannot be necessary to prohibit its being done."* But he has just said that a state constitution exists to limit the *otherwise plenary* power of the legislature. How explain this apparent contradiction? An explanation has already been supplied by a quotation from the New York decision of *Sill* v. *Corning*.[5] The object of the constitution, runs the passage quoted, "is not to grant legislative power, but to confine and restrain it. Without constitutional

[4] Cooley, Constitutional Limitations (ed. 1) 169-173; (ed. 7) 237-242.

[5] 15 N. Y. 297, 303 (1857). See also Weister v. Hade, 52 Pa. St. 474, 477 (1866).

limitations, the power to make laws would be absolute. These limitations are created and imposed by the express words, *or, arise by necessary implication. The leading feature of the constitution is the separation and distinction of the powers of the government. It takes care to separate the executive, legislative and judicial powers and to define their limits.*" In a word the power which is conferred upon the legislature is the *legislative* power, and no other. This single phrase tells the tale. It is no longer good form, because it is no longer necessary, for a court to invoke natural rights and the social compact in a constitutional decision. But the same result is achieved by construing the very term by which "legislative power" is conferred upon the legislature. Such doctrine plainly has nothing in common with that of IREDELL. His theory was that in a constitution which should stop short with creating the three departments of government, the legislative power would be absolute. The doctrine espoused by COOLEY, on the other hand, reposes the main structure of Constitutional Law upon the simple fact of the coexistence of the three departments in the same constitution. Natural rights, expelled from the front door of the constitution are readmitted through the doctrine of the separation of powers. And what does this fact signify for judicial review? The answer is self-evident. Once it was recognized that to define "legislative power" finally and authoritatively lay with the courts, the power of judicial review became limited only by the discretion of the judges and the operation of the doctrine of *stare decisis*. The history of judicial review is, in other words, the history of constitutional limitations.

Preliminary, however, to entering upon this story, it is necessary for us to turn back a little way to supply a phase of the topic just under discussion. The date of the decision in *Sill* v. *Corning* was 1857 and COOLEY'S great work did not appear until 1868. Such recognition moreover as is accorded the principle of legislative sovereignty in these places, slight and banal as upon investigation it is seen to be, was due to developments lying this side the formative period of American Constitutional Law, in fact to developments that brought that period to a close. Despite therefore his tone of disparagement for the views of "speculative jurists," if we are to judge of views from their comparative success in establishing themselves in practice, it was IREDELL himself who was "speculative." The fact of the matter is that IREDELL'S tenet that courts were not to appeal to natural rights and the social compact as furnishing a basis for constitutional decisions was disregarded by all the leading

judges and advocates of the early period of our constitutional history. MARSHALL, it is true, had imbibed from BLACKSTONE'S pages much the same point of view as had IREDELL. But on the crucial occasion of his decision in *Fletcher* v. *Peck*,[6] he freely appealed to "the nature of society and government" as setting "limits to the legislative power," and putting the significant query, "How far the power of giving the law may involve every other power," proceeded to answer it in a way that he could not possibly have done had he not, for the once, at least, abandoned BLACKSTONE. The record of others has not even this degree of ambiguity. Justices WILSON, PATERSON, STORY and JOHNSON, Chancellors KENT and WALWORTH, Chief-Justices GRIMKE, PARSONS, PARKER, HOSMER, RUFFIN and BUCHANAN all appealed to natural rights and the social compact as limiting legislative powers. They and other judges based decisions on this ground. The same doctrine was urged by the greatest lawyers of the period, without reproach. How dominant indeed were Justice CHASE'S "speculative" views with both bench and bar throughout the period when the foundation precedents of constitutional interpretation were being established is shown well by what occurred in connection with the case of *Wilkinson* v. *Leland*,[7] decided by the Supreme Court of the United States in 1829, at the very close of this epoch. The attorney of defendants in error was Daniel WEBSTER. "If," said he, "at this period, there is not a general restraint on legislatures, in favor of private rights, there is an end to private property. Though there may be no prohibition in the constitution, the legislature is restrained from acts subverting the great principles of republican liberty and of the social compact." To this contention his opponent William WIRT, responded thus: "Who is the sovereign? Is it not the legislature of the state and are not its acts effectual, *unless they come in contact with the great principles of the social compact?*" The act of the Rhode Island legislature under review was upheld, but said Justice STORY speaking for the court: "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." Forty-five years later, Justice MILLER, speaking for an all but unanimous bench in *Loan Association* v. *Topeka*,[8] makes the same doctrine the

[6] 6 Cranch 87 (1810).
[7] 2 Pet. 627, 646-7, 652, 657 (1829).
[8] 20 Wall. 655 (1874).

basis of a decision overturning a state enactment, while IREDELL'S view receives reiteration in the lone dissent of Justice CLIFFORD.

But now was it the intention of these men to leave it with the courts to draw the line between legislative power and *all* rights which might be designated "natural rights"? We speedily discover that it was not, and in so doing discover at last IREDELL'S vindication. *A priori,* it is difficult to see how our judges, having set out to be defenders of "natural rights," were in a position to decline to defend, and therefore to define, all such rights whether mentioned in the constitution or not. The difficulty is disposed of, however, the moment we recollect that our judges envisaged their problem not as moral philosophers but as lawyers, and especially as students of the *Common Law.* "Natural rights," in short, were to be defined in light of Common Law precedents.

But there was also a second consideration limiting and easing the task of the judges. In his chapter on "The Absolute Rights of Individuals" BLACKSTONE had written thus: "These may be reduced to three principal or primary articles . . . I. The right of personal security" consisting "in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. . . . II. . . . the personal liberty of individuals . . ." consisting "in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, *unless by due course of law.* . . . III . . . The absolute right, inherent in every Englishman . . . of property: which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, *save only by the laws of the land.*"[9] As we have already seen BLACKSTONE regarded Parliament's power as legally unlimited. His subordination of the "Absolute Rights of Individuals" in each case to the law signifies therefore their plenary control by the legislature and so for our purpose must be ignored. What *is* to our purpose is the definition given in the above quotation of the rights pronounced "absolute." For these are the rights precisely which, with judicial review based upon the social compact and directed to keeping legislative power within its inherent limitations, the courts were called upon to protect against legislative attack.

But were all these rights in fact exposed to legislative attack? The right of *personal security* certainly was not. On the contrary from the very beginning we find the courts characterizing the legislative power as calculated to safeguard that right by assuring the

[9] 1 Black, Comm. 129-137.

prevalence of the maxim of the Common Law: "*Sic utere tuo ut alienum non laedas.*" Again it was little likely that the right of *personal liberty* would be infringed under a republican form of government. This was a right that all were capable of enjoying equally merely by virtue of their being persons. Furthermore, the rights of accused persons were safeguarded in both the federal Constitution and, for the most part, the state constitutions by elaborate and detailed specification; and the decision in *Calder* v. *Bull* had not weakened these safeguards. The right meant to be safeguarded by the appeal to the social compact and natural rights was therefore the Property Right. This was the right which, the old DIALOGUE OF DOCTOR AND STUDENT informs us, was protected by the "law of reason," by which term those "learned in the law of England" were wont to designate the "law of nature."[10] More than that, it was the right precisely which, in the estimation of the fathers, representative institutions had left insecure.

We are now prepared to consider the underlying doctrine of American Constitutional Law, a doctrine without which indeed it is inconceivable that there would have been any Constitutional Law. This is the Doctrine of Vested Rights, which—to state it in its most rigorous form—setting out with the assumption that the property right is fundamental, treats any law impairing *vested rights,* whatever its intention, as a bill of pains and penalties, and so, void.

The fundamental character of the property right was asserted repeatedly on the floor of the Convention of 1787.[10a] It is therefore no accident that the same doctrine was first brought within the purview of Constitutional Law by a member of that Convention, namely, Justice PATERSON in his charge to the jury in *Van Horne's Lessee* v. *Dorrance,*[11] the date of which is 1795. "The right of acquiring and possessing property and *having it protected* is one of the natural, inherent and unalienable rights of man. Men have a sense of property: property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact and by the late constitution of Pennsylvania was made a fundamental law. . . . The legislature therefore had no authority to make an act divest-

[10] C. H. McIlwain, The High Court of Parliament and its Supremacy, 105-6.

[10a] Farrand, loc. cit. I, 424, 533-4, 541-2, II, 123. cf. ib. I, 605. See also Federalist No. 10.

[11] 2 Dall. 304, 310 (1795).

ing one citizen of his freehold and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of social alliance, in every free government; and lastly, it is contrary both to the letter and spirit of the constitution." On the basis of this reasoning an act of 1789 is pronounced "void, . . . a dead letter and of no more virtue or avail than if it never had been made."

A full decade earlier, however than *Van Horne's Lessee* v. *Dorrance,* the doctrine of vested rights is simply assumed by the Supreme Court of Connecticut in the *Symbury Case.*[12] Again in 1789 in the case of *Ham* v. *McClaws and wife,*[13] the Supreme Court of South Carolina had invoked similar principles to give to a particular statute such construction as would "be consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law." Three years later, the same court pronounced invalid an act of the assembly passed in 1712, transferring a freehold from the heir at law to another individual. The court announced itself as "clearly of the opinion that the plaintiffs could claim no title under the act in question, as it was against common right, as well as against the Magna Charta to take away the freehold of one man and vest it in another, . . . without any compensation, or even a trial by the jury of the country, to determine the right in question; that the act was therefore *ipso facto* void; and that no length of time could give it validity, being originally founded on erroneous principles."[14] It is a striking fact that in at least half of the original fourteen states, to include Vermont in the reckoning, the doctrine of judicial review was first recognized in connection with cases involving also an acceptance of the doctrine of vested rights.[15] We are able therefore to comprehend the significance of a remark by Justice CHASE in 1800 to the effect that the court ought to accord different treatment to laws passed by the states during the Revolution and those passed since the Constitution of the United States had gone into effect, since "few of the revolutionary acts would stand the rigorous tests now applied."[16]

[12] Kirby 444 (1785).

[13] 1 Bay 93, 98 (1789).

[14] Bowman v. Middleton, 1 Bay 252 (1792).

[15] Besides the cases just mentioned, see the case described by Jeremiah Mason in his Memories, pp. 26-7, in which the New Hampshire court pronounced an Act unconstitutional, in 1784. The same case is referred to by Wm. Plumer's Life of Wm. Plumer, p. 59. See also Proprietors, etc. v. Laboree, 2 Greenl. (Me.) 275, 294 (1823); Emerick v. Harris, 1 Binn. (Pa.) 416 (1808); Whittington v. Polk, 1 Harr. & J. (Md.) 236 (1802).

[16] Cooper v. Telfair, 4 Dall. 14, 19 (1800).

This assertion soon received striking confirmation. In 1802 the Virginia Court of Appeals, after having in 1797 given the most sweeping possible interpretation to the law forbidding entails,[17] proceeded to the very verge of overturning laws disposing of the Church's lands, which was saved by the mere accident of Justice PENDLETON'S death the night before the decision, leaving the court equally divided. And even the judges who affirmed the constitutionality of the statute under review took pains not to traverse the doctrine of vested rights, one of them, Judge ROANE, going so far as to say that the constitution itself could not validly impair such rights.[18]

But the acceptance of this doctrine by the courts one after the other is but the beginning of the story. We must see how the progress of the doctrine was aided by the obscuration on the part of the courts of essential distinctions, or even their deliberate obliteration; how the doctrine attracted to its support other congenial principles; how it vitalized certain clauses of the written constitution; how in short it gradually operated to give legal reality to the notion of governmental power as *limited power.*

Of the distinctions above referred to the one whose disappearance we should first note is that between "retrospective laws," in the strict sense of laws designed "to take effect from a time anterior to their passage," and laws "which though operating only from their passage affect vested rights and past transactions." The distinction is recognized by STORY in *Society* v. *Wheeler,*[19] but only to be thrust aside. "Upon principle," he declares, "every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective." In support of his argument he cites *Calder* v. *Bull,* and warrantably. The distinction in fact was not so much obscured as entirely ignored from the first. Of more vital necessity, however, to the doctrine of vested rights, was the elimination of the distinction underlying the decision in *Calder* v. *Bull* between legislative enactments designed to punish individuals for their past acts and enactments which in giving effect to the legislature's view of public policy incidentally affected private rights detrimentally. Doubtless, this result was facilitated by the oft-expressed reluctance of the courts to enter into the question of the motives of the legislature, *i. e.,* of its members. And this question

[17] Carter v. Tyler, 1 Call 165 (1797).
[18] Turpin v. Locket, 6 Call 113 (1804).
[19] 2 Gall. C. C. 105, 139 (1814), Fed. Cas. 13, 156.

and that of the intention underlying the legislature's acts, though two quite different matters, it was easy to confuse. Hence it became doctrine in many quarters that the validity of statutes must depend upon external tests, particularly upon their actual operation upon private rights. The matter is one that will receive further attention later on.

But if the obliteration of one distinction is thus sufficiently explained, that of another is by the same line of reasoning made the more difficult of palliation. This is the very obvious distinction between *special* acts and *general* acts. The mischief of what has been called "prerogative legislation," that is, legislation modifying the position of named parties before the law, was one of the most potent causes of the general disrepute into which state legislatures had fallen before 1787.[20] For such measures, furthermore, rarely or never could the justification be pleaded of an imperative public interest. When accordingly such measures bore heavily upon the vested rights of particular, selected persons it was not strange that the courts should have treated them as equivalent to bills of pains and penalties. But the case of general statutes is obviously different. To enact these is of the very essence of legislative power. Their generality indeed furnishes the standard of legislation from which special acts are condemned. It is true that such measures will often bear more particularly upon some members of the community than others, but this fact is perhaps but the obverse of the necessity for their enactment. Notwithstanding these considerations the courts, building upon the Common Law maxim that statutes ought not in doubtful cases be given a retrospective operation, laid down from the first the doctrine as one of constitutional obligation, that in no case was a statute to receive an interpretation which brought it into conflict with vested rights.[21] So far as a statute did not impair vested rights, it was good, but so far as it did, it was a bill of pains and penalties and void, not under Art. I, § 10 of the United States Constitution,—for the actual precedent of *Calder* v. *Bull* still held, despite protests from eminent judges,—but under the general principles of Constitutional Law held to underlie all constitutions.

We turn next to consider the support which the doctrine of vested rights drew from other principles. In this connection our attention is first drawn to the decision of the Massachusetts Supreme Court in *Holden v. James*[22], in which the sentiment of equality before the

[20] See, e. g., Federalist No. 48 (Lodge's Ed.).

[21] Cf. Elliott v. Lyell, 3 Call 268, 286 (1802) and Turpin v. Locket, 6 Call 113 (1804). See also Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 498 (1811).

[22] 11 Mass. 396 (1814). See also Lewis v. Webb, 3 Greenl. (Me.) 326 (1825).

law, given its classic expression in the Declaration of Independence, is forged into a maxim of Constitutional Law. More specifically it was held in this case that, notwithstanding the fact that the twentieth article of the Massachusetts constitution expressly recognized the power of the legislature to suspend laws, such suspensions must be general and not for the benefit of a particular individual or individuals, it being "manifestly contrary to the first principles of civic liberty, natural justice, and the spirit of our constitution and laws that any one citizen should enjoy privileges or advantages which are denied to all others under like circumstances." The converse of this doctrine was stated by Chief Justice CATRON of the Tennessee Supreme Court fifteen years later in the much cited case of *Vanzant v. Waddell.*[23] There it was declared that the kind of legislation which the legislature was created to enact was "general, public law equally binding upon every member of the community . . . . . under similar circumstances." The final clause of the first section of the Fourteenth Amendment takes its rise thence.

But of all principles brought to the support of the doctrine of vested rights, the one destined to prove, at least before the Civil War, of most varied and widest serviceability was the principle of the separation of powers. I have already touched upon the matter a few pages back. At this point I wish to review briefly some historical phases of the subject. Our starting point is the case of *Cooper v. Telfair,*[24] decided by the Supreme Court of the United States in 1800 on appeal from the United States Circuit Court for the District of Georgia. The measure under review was the act of the Georgia legislature of May 4, 1782, inflicting penalties on, and confiscating the estates of, certain persons declared guilty of treason. In opposition to the statute it was urged especially that it transgressed Art. I of the Georgia Constitution of 1777, which provided that "the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." The act was nevertheless upheld as valid. Said Justice CUSHING: " The right to confiscate and banish, in the case of an offending citizen, must belong to every government. It is not within the judicial power, as created and regulated by the constitution of Georgia: and it naturally, as well as tacitly, belongs to the legislature." Said Justice PATERSON: "The legislative power of Georgia, though it is in some respects restricted and qualified, *is not defined* by the constitution of the state." To the same

[23] 2 Yerg. (10 Tenn.) 259 (1829). See also Wally's Heirs v. Kennedy, 2 Yerg. (10 Tenn.) 554 (1831) and Jones' Heirs v. Perry, 10 Yerg. (18 Tenn.) 59 (1836).

[24] 4 Dall. 14 (1800).

effect were the words of Justice CHASE: "The general principles contained in the constitution are not to be regarded as rules to fetter and control, but as *matter merely declaratory and directory.*"

At first, in other words, the doctrine of the separation of powers, even when formulated in the written constitution, was not deemed precise enough to admit of its being applied by courts as a constitutional limitation. The other point of view, however, was not long in making its appearance. In *Ogden* v. *Blackledge*,[25] which was certified to the Supreme Court from the United States Circuit Court for the District of North Carolina in 1804, the question to be determined was whether the state statute of limitations of 1715 had been repealed in 1789, the North Carolina legislature having declared in 1799 that it had not been. Said attorneys for plaintiff: "To declare what the law is, or has been, is a judicial power; to declare what it shall be, is legislative. One of the fundamental principles of all our governments is that the legislative power shall be separated from the judicial." "The Court," runs the report, "stopped counsel, observing that it was unnecessary to argue that point." Without recurring to the constitutional question, the court held that "under all the circumstances stated," the act in question had been repealed in 1789. Fifteen years later, the New Hampshire Supreme Court, in the leading case of *Merrill v. Sherburne*,[26] brought the principle of the separation of powers squarely to the support of the doctrine of vested rights. There was henceforth no apology or evasion on the part of judges in the manipulation of this principle.

The doctrine of vested rights was at last within reach of the haven of the written constitution; in fact it had already found anchorage there, in certain jurisdictions. The reflex effect upon it of its new security was what might have been anticipated: it became a yet more exacting and rigorous test of legislation than ever before. Henceforth, accordingly, it becomes necessary to recognize two varieties of the doctrine of vested rights, the milder and more flexible, the more abstract and rigorous. Courts which continued to appeal to natural rights were compelled by their own logic to consider constitutional questions not simply in their legal aspects but in their moral aspects as well. We thus find Chief Justice PARKER in *Foster v. Essex Bank*[27] declaring, with reference to the immunity claimed by the defendant corporation under its charter, from action for

[25] Cranch 272 (1804); see also Ogden v. Witherspoon, 2 Haywood 227, 3 N. C. 404 (1802).

[26] 1 N. H. 199, 204 (1819).

[27] 16 Mass. 245, 273 (1819); see also State v. Newark, 3 Dutcher (27 N. J. L.) 185, 197 (1858).

debt, that "there is no vested right to do wrong." A little later, Chief Justice HOSMER in *Goshen* v. *Stonington*[28] sustained on the ground of its reasonableness and justice a statute the retrospective operation of which he admitted to be "indisputable" and "equally so its purpose to change the legal rights of the litigating parties." The decision of the United States Supreme Court in *Livingston* v. *Moore*[29] was to like effect. Those courts, on the other hand, which sought to effect an absolute separation of legislative and judicial powers regarded any enactment disturbing vested rights, whatever the justification of it, as representing an attempt by the legislature to exercise powers not belonging to it and *ipso facto* void. This attitude is well represented by the New Hampshire Supreme Court in *Opinions of the Judges,*[30] but it also became in time the attitude embodied in the conservative doctrine of New York.

This differentiation of two varieties of the doctrine of vested rights brings us to a highly important branch of our subject: namely, the effect of this doctrine upon the acknowledged prerogatives and functions of government. As we have already seen, the doctrine of vested rights takes its origin from a certain theory of the nature and purpose of government. But political theory is not Constitutional Law, though often the source of it. The doctrine of vested rights, however, is Constitutional Law; indeed in one disguise and another it is a great part of it. Its protean faculty of appearing ever in new forms and formulations is, however, to be of later concern. What we need to do now is to see it at work in the forms which it assumed from the first, shaping the great uncontroverted powers of the American state, the power of taxation, the power of eminent domain, and what is today designated "the police power."

Mention has been made of the conservative New York doctrine. The founder of this doctrine and so to no small extent the founder of American Constitutional Law was the great Chancellor KENT, whose COMMENTARIES were and remain not only a marvel of legal learning but also of literary expression, and altogether one of the greatest intellectual achievements to the credit of any American. The work is divided into "Parts," which in turn fall into "Lectures." The opening Lecture of Part V, the 34th of the work, deals with "The History, Progress and Absolute Rights of Property" and to this Lecture, which was composed about the year 1825, we now turn.

KENT sets out by disparaging the idea of "a state of man prior

[28] 4 Conn. 209, 221 (1822). See also Booth v. Booth, 7 Conn. 350 (1829) and Welch v. Wadsworth, 30 Conn. 149 (1861).

[29] 7 Pet. 469, 551 (1833).

[30] 4 N. H. 565, 572 (1827).

to the existence of any notion of separate property." "No such state," he contends, "was intended for man in the benevolent dispensations of Providence. . . . The sense of property is inherent in the human breast and the gradual enlargement and cultivation of that sense from its feeble force in the savage state to its full vigor and maturity among polished nations forms a very instructive portion of the history of civil society. Man was fitted and intended by the author of his being for society and government and for the acquisition and enjoyment of property. It is, to speak correctly, the law of his nature: and by obedience to this law, he brings all his faculties into exercise and is enabled to display the various and exalted powers of the human mind." Nevertheless, "there have been modern theorists," KENT marvels, "who have considered separate and exclusive property and inequalities of property as the cause of injustice and the unhappy result of government and artificial institutions. But," he rejoins to such theorists, "human society would be in a most unnatural and miserable condition if it were possible to be instituted or reorganized upon the basis of such speculations. The sense of property is bestowed on mankind for the purpose of rousing them from sloth and stimulating them to action. . . . The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections." "The legislature," therefore, "has no right to limit the extent of the acquisition of property. . . . A state of equality as to property is impossible to be maintained, for it is against the laws of our own nature; and if it could be reduced to practice, it would place the human race in a state of tasteless enjoyment and stupid inactivity, which would degrade the mind and destroy the happiness of social life." And by the same token, "civil government is not entitled, in ordinary cases, ... to regulate the uses of property in the hands of the owners by sumptuary laws or any other visionary schemes of frugality and equality. . . . No such fatal union (as some have supposed) necessarily exists between prosperity and tyranny or between wealth and national corruption in the harmonious arrangements of Providence." *Liberty "depends essentially upon the structure of government,* the administration of justice and the intelligence of the people and it has very little concern with equality of property and frugality of living . . . ."

The interest and importance of these words of KENT arises from no novelty of doctrine advanced in them, but on the contrary, from their explicit formulation of a point of view that is so far from novel that it is ordinarily simply assumed. And so it would have remained with KENT, very likely, had he not deemed it necessary to meet and refute the levelling doctrines of HARRINGTON, CONDORCET and ROUSSEAU. But the matter of especial importance at this stage is to find out how this point of view manifested itself when brought into contact with those prerogatives which KENT freely accorded government.

As to taxation, KENT'S theory is obviously the *quid pro quo* theory and this has remained the theory of American courts from that day to this. From it follows the maxim that taxation must be "equal in proportion to the value of property."[31]

With reference to the power of eminent domain, KENT but reiterates in his COMMENTARIES the views which as Chancellor he had earlier developed in the leading case of *Gardner* v. *Newburgh*,[32] to which therefore we turn directly. In this case, which was decided in 1816, the statute under review was one authorizing the trustees of the village of Newburgh to supply its inhabitants with water by means of conduits. As stated by the Chancellor, the statute made "adequate provision for the party injured by the laying of the conduits through his land" and also "to the owners of the spring or springs from whence the water" was to be taken. But no compensation was provided the plaintiff Gardner, "through whose land the water issuing from the spring" had been accustomed to flow. At this date there was no provision in the New York constitution with reference to the power of eminent domain. Nevertheless upon the authority of GROTIUS, PUFFENDORF, BYNKERSHOECK and BLACKSTONE, KENT developed the following propositions: 1st, that the legislature might "take private property for necessary or useful *public* [sic] purposes;" 2ndly, that such taking, however, did not involve the absolute "stripping of the subject of his property," but, in the language of BLACKSTONE, "the giving him a full indemnification," since "the public is now considered as an individual treating with an individual for an exchange;" 3rdly, that such indemnification was due not merely those whose property was actually appropriated by the state but also those whose property should be injured in consequence of the use made by the state of the property appropriated; 4thly, that the legislature itself was not the final judge of what sum

[31] 2 Kent, Comm. 332.
[32] 2 Johns. Ch. 162, 166-7 (1816).

was "a full indemnification" of owners whose property was taken or injured. The court thereupon isued an injunction against the trustees, "to see whether the merits of the case will be varied," it being a nuisance at the Common Law to divert a watercourse and an injunction being necessary to prevent an impending injury. In his COMMENTARIES ten years later KENT reaffirms all these propositions. His exposition of them furthermore makes it plain that he regards the requirement of a public purpose a true constitutional limitation, susceptible of judicial enforcement. In other words, not every purpose for which the legislature may elect to exercise the power of eminent domain is for that reason a *public* purpose. The legislature cannot even by the power of eminent domain transfer the property of A to B without A's consent.[33]

The third power of government touching property rights KENT describes in the following terms: "But though property be thus protected, it is still to be understood, that the law-giver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right to the injury or annoyance of others or of the public. The government may by general regulations interdict such uses of property as would create nuisances and become dangerous to the lives and health or peace or comfort of the citizens. Unwholesome trades, slaughter houses, operations offensive to the senses, the deposit of gunpowder, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interest of the community."[34]

But is the power thus described unlimited, that is, limited only by the discretion of the lawgiver? In the first place, be it noted, the power in question is described as a power of *regulation,* which, at least so it came eventually to be urged, is distinguishable from a power of *prohibition.* True KENT himself admits that there are uses of property which constitute *nuisances* in certain cases, and he says in another place, that there are "cases of urgent necessity" in which property may be destroyed, as for instance when houses are razed to prevent the spread of a conflagration.[35] But it is apparent from his citations that he regards such cases as already provided

[33] 2 Kent, Comm. 340, and notes. Cf. Paterson, J., in Van Horne's Lessee v. Dorrance, 2 Dall. 304, 310 (1795).

[34] 2 Kent, Comm. 340 and notes.

[35] 2 Kent, Comm. 338-9 and notes.

for in Common Law precedent, that he has no intention of recognizing in the legislature a power to define cases of nuisance and urgency, unrestrained by precedent. Again his doctrine of consequential damages must not be forgotten in this connection. For if it was incumbent upon the state to render compensation for damages resulting from its use of the power of eminent domain, why should it not also be the state's duty to pay private owners for damages resultant from the use of its police powers? Lastly, it is entirely apparent that KENT had not the least idea in the world of abandoning the doctrine which had received his repeated sanction, that a legislative enactment must never be so interpreted as to impair vested rights.[36]

For further instruction in the New York doctrine we turn to some New York decisions following KENT'S COMMENTARIES. The very year of the publication of the second volume of this work occurred the cases of *Vanderbilt* v. *Adams* and *Coates* v. *Mayor of the City of New York,* both to be found in the seventh volume of Cowen's reports.[37] In the former, plaintiff in error contended that a statute authorizing harbor masters to regulate and station vessels in the East and North Rivers did not extend to owners of private wharves; or that if it did so extend, it assumed to authorize an interference with private property in a way that was beyond the power of the legislature. The argument was founded upon *Gardner* v. *Newburgh, Dask* v. *Van Kleeck, Fletcher* v. *Peck,* and derivative cases. The court upheld the statute but in language significantly cautious. Said Justice WOODWORTH: "It seems to me that the power exercised in this case is essentially necessary for the purpose of protecting the rights of all concerned. It is not in the legitimate sense of the term a violation of any right, but the exercise of a power indispensably necessary where an extensive commerce is carried on. . . . . The right assumed under the law would not be upheld if exerted beyond what may *be considered* a necessary police regulation. The line between what would *be a clear invasion of the right, on the one hand, and regulations not lessening the value of the right and calculated for the benefit of all must be distinctly marked.* . . . Police regulations are legal and binding because for the general benefit and *do not proceed to the length of impairing any right in the proper sense of the term.* The sovereign power in a community, therefore, may and ought to prescribe the manner of

[36] Dash v. Van Kleeck, 7 Johns. 477, 498 (1811); see also 1 Kent Comm. 455-6 and notes.

[37] Vanderbilt v. Adams, 7 Cow. 349 (1827) and Coates et al. v. Mayor etc., 7 Cow. 585 (1827).

exercising individual rights over property. It is for the better protection and enjoyment of that absolute dominion which the individual claims. . . . . ." The individual himself, as well as others, is benefitted by legitimate regulation.

But what is *legitimate regulation?* In *Coates* v. *Mayor,* the statute under review authorized the City of New York to make by-laws "for regulating, or if they found it necessary, preventing, the interment of the dead" within the city. In pursuance of this statute the city had passed a prohibitory ordinance, which plaintiffs in error claimed to be inoperative in their cases on account of certain grants of land held in trust by them for the sole purpose of interment. The argument against the legislative power in the premises again rested upon *Gardner* v. *Newburgh, Fletcher* v. *Peck,* and like precedents. "The public good," it was conceded, "is paramount. This is admitted in taking land for roads and canals. But land thus taken must be paid for. Is it not the same thing," it was asked, "whether the public good is to be promoted by taking the use of property for public benefit or destroying the property for the same purpose?" "The legislature cannot take away a single attribute of private property without remuneration." To meet these contentions the attorneys for the municipality were forced to resort to doctrine from an alien jurisdiction, doctrine which moreover bore in its origin no reference to the question before the New York court. Thus in his opinion in *Gibbons* v. *Ogden,*[38] Chief Justice MARSHALL had described the field of legislation left to the states *by the Constitution of the United States* in very board terms. This description was now utilized to show the scope of legislative power *under the state constitution* in relation to the property right. Again, in *McCulloch* v. *Maryland,*[39] MARSHALL had construed the words "necessary and proper" of Art. I, § 8, of the United States Constitution as meaning "expedient," and it was now urged that the term "necessary" in the legislative grant of power to the municipality must be similarly defined. Finally, in *Martin* v. *Mott,*[40] the Supreme Court of the United States had held that where a discretionary authority was vested by the Constitution in the President, its use was not subject to judicial review. The same line of argument was now contended to be applicable to a state legislature in the exercise of its powers. "The power in question," declared defendant's attorney, "is a legislative power, which must, on the subject of regulation, be transcendent. The legislators are the

[38] 9 Wheat. 1 (1824).
[39] 4 Wheat. 316 (1819).
[40] 12 Wheat. 19 (1827).

judges and their decision must be conclusive. Even a general law to prevent the growing of grain throughout the state, however despotic, could not be disobeyed as wanting constitutional validity."

The by-law, and the statute upon which it was based, were both sustained. Speaking of the question of the necessity of the former, the court said: "This necessity is not absolute. It is nearly synonymous with *expediency* or *what is necessary for the public good.*" To judge of that matter, however, is the function of the legislature; it being "of the nature of legislative bodies to judge of the exigency upon which their laws are founded." And the law itself is "equivalent to an averment that the exigency has arisen, been adjudicated and acted upon." The duty of the court is merely to see "that the law operates upon the subject of the power."

It would be easy to interpret this language in a way to release the legislature from all constitutional restraints. To do this, however, was as far as possible from the intention of the court. "We are of opinion," its decision proceeds, "that this by-law is not void, either as being unconstitutional, or as conflicting with what we acknowledge as a *fundamental principle of civilized society, that private property shall not be taken even for public use without just compensation.* No property has in this instance been entered upon or taken. None are benefitted by the destruction, or rather the suspension, of the rights in question in any other way than citizens always are when one of their number is forbidden to continue a nuisance."

Coates v. *Mayor* therefore seems to furnish authority for the following propositions: 1 The legislature is the exclusive judge of the expediency of exercising its powers; 2 Property can be appropriated by the State only for a public use and upon the making of just compensation; 3 The legislative power of regulation extends to the abatement of nuisances,existing or impending: 4 If in such cases, property rights are destroyed, no compensation is due their owner. The power of eminent domain and that of regulation are distinct and the doctrine of consequential damages does not apply in the case of the latter.

One question remains, however: Who is to say finally whether there *is* a nuisance? The plain inference from the whole line of argument taken by the court in this case is that, what is a nuisance is a question of fact to be judged of in the last analysis by the courts in accordance with Common Law standards. And this inference becomes certainty when we turn to a line of decisions, extending from 1837 to 1845, in which a statute authorizing municipal officers to

destroy buildings to prevent the spread of fire, is reviewed and applied by the Court of Errors and Appeals.[41] The language of some of the lay members of the court is especially significant. By Senator EDWARDS the statute is treated as merely defining and limiting a Common Law right of even private persons in such an exigency. By Senator VERPLANCK, the right assumed by the statute is described as "a natural right, arising from inevitable and pressing necessity, when [of] two immediate evils, one must be chosen and the less is voluntarily inflicted in order to avoid the greater." In support of this definition is cited COKE's language in *Mouse's case,* where it was said, with reference to baggage thrown overboard in time of storm, that "if the danger accrued by the act of God . . . everyone ought to bear his loss for safeguard of the life of man." In other words, since no right of action would lie for private trespass in such a case, neither could compensation be claimed against the state. The same course of reasoning is pursued by Senators SHERMAN and PORTER in *Russell* v. *Mayor.*[41a] The occasions, in short, when the state might legitimately press its power of regulation to the extent of actually destroying property rights were relatively few and were plainly indicated in the Common Law.

The New York doctrine invites comparison with that of Massachusetts. In the latter commonwealth the rejection of the doctrine of consequential damages and the resultant differentiation of the power of eminent domain from that of police regulation preceded, though it does not seem to have aided, the like development in the former. And once again, the starting-point was furnished by the law of private trespass. In the case of *Thurston* v. *Hancock,*[42] decided in 1815, it was concluded, from an exhaustive review of the precedents by Chief Justice PARKER, that where one dug so deep into his own land as to endanger a house on land adjoining, the owner of the latter had no right of action for the damage done the house, but only for the damage arising from the falling of the natural soil into the pit so dug. In *Callender* v. *Marsh,*[43] decided eight

[41] The ensuing quotations are from Stone v. Mayor, 25 Wend. 157 (1840) at pages 161 and 174. see also Hart v. Mayor, 9 Wend. 571 (1832); Van Wormer v. Mayor, 15 Wend. 262 (1836); Meeker v. Van Rensselaer, 15 Wend. 397 (1836); and Mayor v. Lord, 17 Wend. 285 (1837). In Van Wormer v. Mayor the court held that the finding of a board of health, that certain premises were a nuisance, could not be traversed in court.

The citation of Mouse's case is 12 Coke 62.

[41a] 2 Denio 461 (1844).

[42] 12 Mass. 220 (1815).

[43] 1 Pick. 417 (1823).

years later, it was held, on the basis of this precedent, that the tenth article of the Massachusetts Declaration of Rights gave "no right to compensation for an indirect or consequential damage or expense resulting from the right use of property already belonging to the public." Finally, in *Baker* v. *Boston,*[44] which was an action to prevent the municipality from filling up a creek which had become injurious to the public health, it was ruled that "police regulations to direct the use of private property so as to prevent its being pernicious to the citizens at large are not void though they may in some measure interfere with private rights without providing for compensation." KENT in his COMMENTARIES stigmatizes the doctrine of *Callender* v. *Marsh* as "erroneous" and in contravention of "a palpably clear and just doctrine," for which he cites his own decision in the *Newburgh case.*[45] At the same time he apparently approves of the New York decision in the *Coates* case. The explanation of the apparent contradiction is to be found in his recognition that the property right infringed in the New York case was a nuisance by Common Law standards.

This, however, is not to say that Common Law standards did not obtain in Massachusetts, in interpreting the Constitution, but only that they were applied in a rather more flexible fashion than in New York. To illustrate this point is therefore the second object of our comparison of the two doctrines. The relative flexibility of the Massachusetts doctrine was due in part, as we have already seen, to the retention of the natural rights theory as the foundation of the doctrine of vested rights. But a further reason for it is to be found in the very words in which legislative power is vested by the Massachusetts constitution in the General Court. This is described as the power "to make, ordain, and establish all manner of *wholesome and reasonable* orders, laws, statutes, and ordinances . . . as they shall judge to be for the government and welfare of the commonwealth."[46] Quoting this passage in the case of *Rice* v. *Parkman,*[47] Chief Justice PARKER ruled, in 1820, that the General Court must be deemed to have a parental or tutorial power over persons not *sui juris,* that is "minors, persons *non compos mentis,* and others," and upon that basis upheld a legislative act licensing the sale of the real estate of certain minors. In New Hampshire, where vested rights had been brought under the protection of the doctrine of the

[44] 12 Pick. 184 (1831). See also Com. v. Breed, 4 Pick. 460 (1827); Com. v. Tewksbury, 11 Metc. 55 (1846); and Com. v. Alger, 7 Cush. 53 (1851).

[45] 2 Kent, Comm. 340, footnote (page 526 of 14th edition).

[46] Part the Second, Chapter I, Section I, Article IV. Thorpe, III, 1894.

[47] 16 Mass. 326, 331 (1820).

separation of powers, similar legislative acts were overturned. The New York court in *Cochran* v. *Van Surley*,[48] accepted the Massachusetts doctrine, but at that date the doctrine of natural rights had not yet been decisively expelled from New York. Also the broader basis for the Massachusetts decision was not adverted to.

But another avenue for the entry of the doctrine that legislation must be "reasonable," in some sense or other, was afforded by the terms in which power is usually conferred by the state legislature upon municipal corporations. A case in point, in which the doctrine in question was turned against the legislation under review, is that of *Austin* v. *Murray*,[49] decided by the Massachusetts Supreme Court in 1834. The question at issue was the validity of a by-law interdicting the bringing of the dead into the town from abroad for purposes of burial, a prohibition which touched chiefly or exclusively Catholic parishioners. The court overturned the by-law as being "wholly unauthorized" by the act of the legislature, and as "an unreasonable infringement on private rights." Elaborating the latter point it said: "The illegality of a by-law is the same whether it may deprive an individual of the use of a part or of the whole of his property; no one can be so deprived unless the public good requires it. And the law will not allow the right of property to be invaded under the guise of a police regulation for the preservation of health when it is manifest that such is not the object and purpose of the regulation . . . [This by-law] is a clear and direct *infringement of the right of property without any compensating advantages, and not a police regulation, made in good faith for the preservation of health.*" In other words the ordinance is overturned, not simply because it impaired vested rights but because it did so without any good public reason. Had such reason been present, the measure would have been upheld. For then the individual whose rights were infringed would himself have benefitted as a member of the public. The police power, like the power of taxation, is controlled by the principle of a *quid pro quo*. The line of reasoning is the same as had been taken by the New York court in *Vanderbilt* v. *Adams*.[50]

But the question of the flexibility of the doctrine of vested rights involves yet another question. This doctrine, to restate it as compendiously as possible, is that the legislature cannot, at least except

[48] 20 Wend. 365, 373 (1838).

[49] 16 Pick. 121 (1834).

[50] 7 Cow. 349 (1827). For further illustrations of the Massachusetts doctrine, see Com. v. Tewksbury, 11 Metc. 55 (1846), and Com. v. Alger, 7 Cush. 53 (1851). See also Stoughton v. Baker, 4 Mass. 522 (1808); Vinton v. Welsh, 9 Pick. 87 (1829); and Com. v. Badlam, 9 Pick. 361 (1830).

for reasons of public policy, enact laws impairing vested rights. The doctrine has therefore two dimensions, so to say, the term "impair" and the term "vested rights." But the general significance of the former term we have already learned in our investigation of the operation of the doctrine upon the powers of government. And even of the second term we have supplied most of the materials for a definition, which only awaits our more circumstantial formulation.

Vested rights are rights vested in specific individuals in accordance with the law in what the law recognizes as *property*. But what for the purposes of the doctrine of vested rights, did the law recognize as property? What, in other words, was the objective of the rights which this doctrine treated as vestable?

In his ESSAY ON PROPERTY, composed in 1792, MADISON had written thus: "This term in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.' But in its larger and juster meaning, it embraces everything to which a man may attach a value and have a right; and which leaves to every *one else the like advantage*. In the former sense, a man's land, or merchandise, or money is called his property. In the latter sense, a man has property in his opinions and a free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. . . . If there be a government then which prides itself on maintaining the inviolability of property, which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property which individuals have in their opinions, their religion, their person, and their faculties, nay more which indirectly violates their property in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the inference will have been anticipated that such a government is not a pattern for the United States. If the United States mean to obtain or deserve the full praise due to wise and just governments they will equally respect the rights of property and the property in rights."[51]

These words are important as showing the elasticity attaching to

[51] Madison, Writings (Hunt ed.) VI, 101 ff.

the term "property," as used by American statesmen, from the beginning. Such latitudinarian views, however, found little or no support from the Common Law, and had in consequence before the Civil War little influence upon judges. So far as the courts liberalized the legal notion of the property right it was chiefly by analyzing it into its constituent elements, the right of use, the right of sale, the right of control, and so on, which were sometimes recognized as property rights even when inhering in another than the legal owner.[52] But the objective of these rights remained for the most part, tangible property, property which could be taken by the power of eminent domain, hence especially real property.[53] Still there were some exceptions to this rule. Art. I, § 10, of the United States Constitution was regarded from the outset as placing the legal fruits of one's lawful contracts in the category of vested rights. By the same token, the *Dartmouth College* decision extended the concept to charter rights, a result which, however, had been anticipated at least in Massachusetts independently of the contract clause.[54] Finally in *Dash* v. *Van Kleeck,* Chancellor KENT, by treating the right to prosecute an action at law, already begun, as a vested right, entered a more controversial field. In a much stronger case some years later, Chief Justice PARKER declared the more usual view that "there is no such a thing as a vested right to a particular remedy."[55]

And doubtless attorneys and suitors would fain have extended the application of the term still further. Said Justice NELSON in *People* v. *Morris*:[56] "Vested rights are indefinite terms, and of extensive signification; not unfrequently resorted to when no better argument exists, in cases neither within the reason or spirit of the principle." Despite this tendency, however, the concept is soon seen, when we bring it into comparison with ideas that have become current since the Fourteenth Amendment was added to the Constitution, to have been kept, first and last, well within bounds. Certainly no one would have thought of suggesting before the Civil War that the right to engage in trade, the right to contract, the right —to employ MADISON'S phrase—of the individual "in the use of his

[52] See some New York cases: Holmes v. Holmes, 4 Barb. 295 (1848); White v. White, 5 Barb. 474 (1849); Perkins v. Cottrell, 15 Barb. 446 (1851); Westervelt v. Gregg, 12 N. Y. 202 (1854).

[53] See McLean, J., in West River Bridge Co. v. Dix, 6 How. 507 (1848) at 536-7.

[54] Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (1819). The Massachusetts case referred to is Wales v. Stetson, 2 Mass. 143 (1806). Cf. Austin v. Trustees, 1 Yeates (Pa.) 260 (1793).

[55] Com. v. Commissioners of Hampden, 6 Pick. 501 (1828). See also Yeaton v. U. S., 5 Cranch 281 (1809).

[56] 13 Wend. 325, 329 (1835).

faculties," were "vested rights." To this fact MADISON'S own antithesis between "rights to property" and "property in rights" is indirect testimony, but most direct evidence is by no means lacking. Especially pertinent are some of the utterances of Chief Justice PARKER in deciding the case of *Portland Bank* v. *Apthorp*,[57] in which the question at issue was the validity of a tax on the stock of an incorporated bank. Said the court: "The privilege of using particular branches of business or employment, as the business of an auctioneer, of an attorney, of a tavern-keeper . . . . etc." have been subjected to taxation "from the earliest practice," and this notwithstanding the fact that "every man has a natural right to exercise either of these employments free of tribute, as much as a husbandman or mechanic to use his personal calling. . . . . Every man has the implied permission of the government to carry on any lawful business, and there is no difference in the right between those which require a license and those which do not, *except in the prohibition, either express or implied,* where a license is required."[57a]

Nor is the logical implication of this language weakened when we turn to consider legislative measures designed not to tax but to regulate business. Many such measures were municipal ordinances, and while their validity was challenged again and again, it was never on grounds furnished by the doctrine of vested rights or any collateral doctrine. In Massachusetts the favorite argument against such by-laws was that they were in restraint of trade and that therefore the authority to enact them had not been conferred by the legislature. This was the argument in the case of *Commonwealth* v. *Worcester*,[58] where the ordinance under review forbade persons in charge of wagons, carts, etc., from driving their horses through the streets at a trot. The court rejected the contention, as also it did the like argument in *Nightingale's* case,[59] where the by-law before the court provided that no one not offering the produce of his own farm for sale should occupy any stand for the vending of commodities except by the permission of the clerk of the market. *Vandine's* case[60] was argued and decided on like grounds.

But of course when the objectionable legislation came from the

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[57] 12 Mass. 252 (1815). See also Shaw, C. J., in Com. v. Blackington, 24 Pick. 352 (1837).

[57a] The point of view of Marshall, C. J. in Ogden v. Saunders is the same. The obligation of contracts which arose from the moral law, was protected by Art. I, § 10 of the Constitution, but the right to contract was subject absolutely to legislative control. 12 Wheat. 213, 346-49.

[58] 3 Pick. 462 (1826).

[59] 11 Pick. 168 (1831).

[60] 6 Pick. 187 (1828).

legislature itself, other principles had to be resorted to. Yet even in such cases, with a simple exception so plainly anomalous as not to merit comment in this connection,[60a] fundamental principles were conspicuously not appealed to. Two cases especially to the point are a Massachusetts case of 1835, *Hewitt* v. *Charier*,[61] and an Ohio case of 1831, *Jordan* v. *Overseers of Dayton*.[62] In these cases the statutes drawn into question confined the practice of medicine to members of certain medical societies and to persons qualified in other stipulated ways. In the Massachusetts case the protestant, who had continued in practice in defiance of the statute, based his case, not upon the ground that would seem most available today, that the statute operated to deprive him of his livelihood and chosen profession, but upon art. 6 of the Massachusetts Declaration of Rights, which forbids, in essence, special privileges to favored individuals. The court overruled the argument. Said Chief Justice SHAW: "Taking the whole article together, we think it manifest that it was especially pointed to the prevention of hereditary rank." But even in applying it according to its literal meaning, "it is necessary to consider whether it was the *intent or one of the leading and substantive purposes of the legislature* to confer an exclusive privilege on any man or class of men," or whether "this is indirect and incidental, ... not one of the purposes of the act," and therefore not "a violation of this article of the Bill of Rights." His conclusion was that the act under review was not "a violation of any principle of the constitution."

In the Ohio case, the argument of plaintiff in error was even more far-fetched, being based upon a patent which he held from the national government for certain drugs and concoctions. Said the court in response: "The sole purpose of a patent is to enable the patentee to prevent others from using the products of his labor except with his consent. But his own right of using is not enlarged or affected. There remains in him . . . . the power to manage his property or give direction to his labors at his pleasure, subject only to the paramount claims of society, which require that his enjoyment may be . . . . regulated by laws which render it subservient to the general welfare." The court concluded with a long list of

[60a] The reference is to Ex parte Dorsey, 7 Porter (Ala.) 293 (1838). The line of reasoning there employed was rejected by the same court and same judges in Mobile v. Yuille, 3 Ala. 137 (1841), where a municipal ordinance prescribed the price of bread.

[61] 16 Pick. 353 (1835).

[62] 4 Ohio 295 (1831). Some other citations of like import may be added: Furman v. Knapp, 19 Johns. (N. Y.) 248 (1821); People v. Jenkins, 1 Hill (N. Y.) 469 (1841); Com. v. Ober, 12 Cush. (Mass.) 493 (1853).

trades which were at that time regulated by statute in the state of Ohio.

Our conclusion then from these and similar cases must be that the doctrine of vested rights was interposed to shield only the property right, in the strict sense of the term, from legislative attack. When that broader range of rights which is today connoted by the terms "liberty" and "property" of the Fourteenth Amendment were in discussion other phraseology was employed, as for example the term "privileges and immunities" of Art. IV, § 2, of the Constitution. In his famous decision in *Corfield* v. *Coryell*,[63] rendered in 1823, Justice WASHINGTON defined this phrase to signify, as to "citizens in the several states," "those privileges and immunities which are in their nature, *fundamental*, which belong of right to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this union." "What these fundamental principles are," he continued, "it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following heads; protection by the government: the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the good of the whole."

But now of all the rights included in this comprehensive schedule, one only, and that in but a limited sense, was protected by the doctrine of vested rights, the right namely of one who had *already* acquired some title of control over some particular piece of property, in the physical sense, to continue in that control. All other rights, however fundamental, were subject to limitation by the legislature, whose discretion as that of a representative body in a democratic country, was little likely to transgress the few, rather specific, provisions of the written constitution.

To conclude:—The doctrine of vested rights represents the first great achievement of the courts after the establishment of judicial review. In fact, in not a few instances, judicial review and the doctrine of vested rights appeared synchronously and the former was subordinate, in the sense of being auxiliary, to the latter. But always, before the Fourteenth Amendment, judicial review, save as a method of national control upon the states, would have been ineffective and lifeless enough, but for the *raison d'etre* supplied it by

[63] 4 Wash. C. C. 371, 380-1 (1823), Fed. Cas. 3230.

the doctrine of vested rights, in one guise or other.[64] Furthermore, the doctrine represented the essential spirit and point of view of the founders of American Constitutional Law, who saw before them the same problem that had confronted the Convention of 1787, namely, the problem of harmonizing majority rule with minority rights, or more specifically, republican institutions with the security of property, contracts, and commerce. In the solution of this problem the best minds of the period were enlisted, WILSON, MARSHALL, KENT, STORY, and a galaxy of lesser lights. But their solution, grounded though it was upon theory that underlay the whole American constitutional system, would yet hardly have survived them had it not met the needs and aspirations of a nation whose democracy was always tempered by the individualism of the free, prosperous, Western World. That distrust of legislative majorities in which Constitutional Limitations were conceived, from being the obsession of a superior class, became, with advancing prosperity, the prepossession of a nation, and the doctrine of vested rights was secure.[65]

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[64] For the most important guise which the doctrine assumed in state courts, particularly the New York courts, see the writer's article on "The Doctrine of Due Process of Law before the Civil War" in 24 Harv. L. Rev. 366, 460. The most important guise which the doctrine developed in the federal courts is to be seen in their interpretation of Art. I, § 10. See Fletcher v. Peck. 6 Cranch 87 (1810), and Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (1819).

[65] See the discussion of the relation of government to the Property Right, in the Mass. Convention of 1820, Journal (Boston, 1853), pp. 247, 254, 275-6, 278, 280, 284-6, 304 ffg. The speakers are Webster, Story, John Adams, et al. Webster's Oration on the Completion of Bunker Hill Monument is a splendid statement of the theory that a democracy in which men are equal will inevitably want to protect private rights against governmental excesses. Writings and Speeches (National Ed., 1903) I, 259 ff'g. On Mar. 21, 1864 Lincoln addressed a committee from the Workingmen's Association of N. Y. He closed with the following words: "Property is the fruit of labor; property is desirable; is a positive good in the world. That some should become rich shows that others may become rich, and hence is just encouragement to industry and enterprise. Let not him who is houseless pull down the house of another, but let him work diligently and build one for himself, thus by example assuring that his own shall be safe from violence when built." Complete works (Ed. of 1905) 54. See also V, 330, 361.